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TMC Contractors, Inc. and Cement Masons' Rock Asphalt and Composition Floor Finishers' Local Union 502, AFL-CIO. Case 13-CA-40398

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND ACOSTA

The General Counsel in this case seeks summary judgment on the ground that the Respondent has failed to answer the complaint. Upon charges filed by the Union on August 6, 2002, and amended on October 29, 2002, the Regional Director issued a consolidated complaint on October 30, 2002, against TMC Contractors, Inc., the Respondent. The complaint alleges, in paragraphs 6 and 8, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging an employee because he engaged in protected activity, and, in paragraphs 5 and 7, that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected activity and by threatening employees with loss of employment because they signed union cards.

The consolidated complaint required the Respondent to file an answer within 14 days of service thereof, which it did not do. By letter of December 30, 2002, counsel for the General Counsel advised the Respondent that unless an answer was received by January 10, 2003, a Motion for Summary Judgment would be filed. On January 6, 2003, the Respondent's president, Kevin Thomas, acting pro se, faxed to the counsel for the General Counsel copies of the Respondent's previously submitted position statement and affidavit. The fax cover sheet indicated that the Respondent intended these documents to be "an answer to the allegations in the Complaint."

In the position statement and the affidavit, the Respondent asserts that it did not discharge employee Tim Timmons, as alleged, but rather Timmons left voluntarily. The affidavit explained that Timmons initially chose to leave the Respondent's worksite following a misunderstanding with the Union. The affidavit further explained that, after the misunderstanding was cleared up, Timmons told the Respondent that he did not want to work for the Respondent because he did not like the environment.

On February 18, 2003, counsel for the General Counsel sent another letter to the Respondent extending the deadline for the Respondent to file an answer to February 25, 2003, and stated that a failure to respond by that date

would result in a Motion for Summary Judgment being filed. The Respondent did not respond to the February 18, 2003 letter. On March 5, 2003, the Region filed the present Motion for Summary Judgment.

On March 12, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. The Respondent has not filed a response to the Notice to Show Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

Section 102.20 specifies that the answer must "specifically admit, deny, or explain each of the facts alleged in the complaint." However, the Board has afforded some latitude to pro se litigants who fail to comply fully with Board procedures in answering complaint allegations. See *Central States Xpress, Inc.*, 324 NLRB 442, 444 (1997). "Thus, the Board will generally not preclude a determination on the merits if it finds that a pro se respondent has filed a timely response, which can reasonably be construed as denying the substance of the complaint allegations." *Nu-Temp Assocs. Heating & Cooling*, 338 NLRB No. 109 (2003). The Board has also allowed pro se respondents to expressly incorporate by reference earlier documents or position statements as an answer to the complaint. *Mid-Wilshire Health Care Center*, 331 NLRB 1032, 1033-34 (2000). To do so, the pro se respondent must intend its precomplaint position statement to serve as an answer to the complaint allegations. *Black's Railroad Transit Service*, 334 NLRB 325 (2001).

We find that the Respondent's January 6, 2003 fax, submitted in response to the Region's request to file an answer, constitutes a sufficient answer to the complaint's 8(a)(3) allegation. In this submission, Thomas expressly stated that he considered his prior submissions to the Region to be "an answer to the allegations in the Complaint," and attached copies of all the prior submissions. These documents effectively deny the allegation that the Respondent violated Section 8(a)(3) of the Act by discharging Timmons for his union activity. As noted above, the documents state that, after rectifying a misunderstanding that caused Timmons to leave the Respon-

dent's worksite, the Respondent asked Timmons to return to work, but Timmons declined further employment with the Respondent. The Respondent's explanation of the events at issue would raise the defense that Timmons left the Respondent voluntarily. Accordingly, under the more lenient standard afforded to pro se respondents, the January 6 fax is sufficient because it contains "effective denials of the substance of these complaint allegations [that] raise substantial and material issue of fact warranting a hearing before an administrative law judge." *Mid-Wilshire*, supra, 331 NLRB at 1034. Because the Respondent has sufficiently answered the 8(a)(3) allegation in the complaint, we deny the Motion for Summary Judgment as to complaint paragraphs 6 and 8.

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act by interrogating employees about their protected activity and by threatening employees with loss of employment because they signed union cards. These allegations have not been answered. The Respondent's January 6, 2003 fax did not refer to either allegation, and the Respondent did not submit any other document referring to these allegations. Accordingly, we shall grant the Motion for Summary Judgment as to complaint paragraphs 5 and 7. *See Mid-Wilshire*, supra (denying motion in part and granting in part for pro se response that substantively denied some complaint allegations but ignored others).

On the entire record, the Board makes the following

FINDINGS OF FACT

1. JURISDICTION

At all material times the Respondent, TMC Contractors, Inc., a corporation with an office and place of business in Chicago, Illinois, has been engaged as a contractor in the building and cement construction industry. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations, has purchased and received at its Chicago, Illinois facility goods valued in excess of \$50,000 directly from points located outside the State of Illinois.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

About May 2002, on a date well known to the Respondent, the Respondent, by Superintendent/Supervisor David Long, at a jobsite located at the Wendell Phillips High School in Chicago, Illinois, interrogated employees about whether they signed union cards, and threatened employees with loss of employment because they signed union cards.

CONCLUSION

By interrogating employees about whether they signed union cards, and by threatening employees with loss of employment because they signed union cards, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Sections 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) by interrogating employees about whether they signed union cards, and by threatening employees with loss of employment because they signed union cards, we shall order the Respondent to cease and desist from interrogating employees about whether they signed union cards, and from threatening employees with loss of employment because they signed union cards.

ORDER

The National Labor Relations Board orders that the Respondent, TMC Contractors, Inc., Chicago, Illinois, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating employees about whether they signed union cards.

(b) Threatening employees with loss of employment because they signed union cards.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Within 14 days after service by the Region, post at the Respondent's facility in Chicago, Illinois, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel's Motion for Summary Judgment is denied with respect to the allegations set forth in complaint paragraphs 6 and 8, and that this proceeding is remanded to the Regional Director for Region 13 for the purpose of arranging a hearing before an administrative law judge limited to the allegations set forth in complaint paragraphs 6 and 8. The administrative law judge shall prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on all of the record evidence. Following service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules shall be applicable.

Dated, Washington, D.C., June 30, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

R. Alexander Acosta, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT interrogate employees about whether they signed union cards.

WE WILL NOT threaten employees with loss of employment because they signed union cards.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act.

TMC CONTRACTORS, INC.